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In the Supreme Court of the United States

OCTOBER TERM 1970

No. 507

JUDITH JAVA, et al.,
Appellees,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants.

On Appeal From the United States District Court
For the Northern District of California

Jurisdictional Statement

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Appellants.

On Appeal From the United States District Court
For the Northern District of California

Jurisdictional Statement

Appellants appeal from the interlocutory judgment of the United States District Court for the Northern District of California entered on May 14, 1970, preliminarily enjoining appellants from enforcing a section of the California Unemployment Insurance Code, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial constitutional questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Northern District of California is not reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought on behalf of appellees and all others similarly situated for injunctive and declaratory relief under the authority of Title 42, U.S.C., section 1983, and Title 28, U.S.C., sections 1343(3) and 1343(4), and sections 2281 and 2284. Jurisdiction was further invoked under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C., section 501 et seq. The judgment of the specially constituted District Court was entered on May 14, 1970, and notice of appeal was filed in that court on June 12, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C. sections 1253 and 2101(b). The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime & Avocado Growers, Inc. v. Jacobsen,* 362 U.S. 73 (1960).

STATUTES INVOLVED

Two statutes are involved: section 1335 of the California Unemployment Insurance Code and section 503(a)(1) of Title 42 of the United States Code. Section 1335 of the California Unemployment Insurance Code provides as follows:

> "1335. If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:
>
> "(a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issue set forth in the appeal,

such benefits shall be promptly paid regardless of such appeal, or

"(b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.

"If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination."

The text of 42 U.S.C. § 503 is attached as Appendix B.

QUESTIONS PRESENTED

1. When a claimant for unemployment insurance has been ruled eligible in an initial interview but her last employer appeals that determination, does a procedure which stays payment of benefits until the employer's appeal is decided deprive the claimant of due process?

2. When a claimant for unemployment insurance has been ruled eligible in an initial interview but her last employer appeals that determination, is the requirement of 42 U.S.C. section 503(a)(1) that the state's procedure must be "reasonably calculated to insure full payment . . . when due" satisfied by a procedure which permits payments to be made only after a referee decides the employer's appeal?

3. A subsidiary question is presented because of the district court's ruling that California Unemployment Insurance Code section 1335 is totally invalid: Where a set of facts may reasonably be conceived to save the constitutionality of a state statute, should a federal court nevertheless rule that the statute is unconstitutional in its entirety?

STATEMENT OF THE CASE

Appellees Judith Java and Carroll Hudson and the class they represent are California citizens who (1) have claimed or will claim unemployment insurance benefits, (2) have been initially determined eligible for benefits, and (3) have not received benefits pending an appeal by their last employer.

In late summer 1969, appellees Java and Hudson applied for unemployment insurance benefits. Pursuant to California procedure, they filled out the necessary forms. Each claimant's last employer contended that benefits should be denied because the claimant was discharged for misconduct or voluntarily quit without good cause. Each claimant was thereafter granted an interview for an initial determination as to eligibility. As a result of these interviews both claimants were ruled eligible for benefits. California procedure further provides that such a determination may be appealed by the last employer within ten days. During this ten-day period a claimant may receive one or two payments but once the employer's appeal is filed, no further payments are made until the appeal is decided. Both claimants here received one or two payments until their last employers filed appeals, at which time further payments were withheld. At the subsequent hearings before a referee plaintiff Hudson's eligibility was affirmed, but in the case of Judith Java the referee reversed the initial determination and ruled she had never been entitled to benefits.

Prior to the hearings before the referee appellees brought this class action for declaratory relief and to enjoin enforcement of section 1335 of the California Unemployment Insurance Code, alleging that they and members of their class should be paid benefits during the time an employer's appeal was pending. Defendants filed a motion to dismiss. The relief prayed for by plaintiffs was granted, the court

ruling that the instant case was indistinguishable from *Goldberg v. Kelly*, 397 U.S. 254 (1970). It further ruled that the California statute does not provide a procedure which is reasonably calculated to insure full payment "when due" and the statute is, therefore, inconsistent with section 503(a)(1) of Title 42, U.S.C., the Social Security Act of 1935, as amended.

THE QUESTIONS ARE SUBSTANTIAL

I. The California Procedures Are Not Inconsistent With the Social Security Act.

The Social Security Act, 42 U.S.C. section 503(a)(1), provides that for the Secretary of Labor to find the state law consistent with federal standards, the state statute must be "reasonably calculated to insure full payment . . . when due." Unfortunately, there is scant legislative history concerning what Congress meant when it used the words "when due". Nevertheless, from the material available it appears that the California statute here involved, California Unemployment Insurance Code section 1335, is in harmony with the federal requirement that payments be made "when due". The California law is based on a recommendation made by federal authorities in 1935. Because the concept and mechanics of unemployment insurance were so complex the task of drafting a proposed federal law was entrusted to a Presidential Committee on Economic Security. While the Social Security Act was under consideration by Congress in 1935, this Committee presented to Congress and circulated to the states two alternative statutes which would serve as models for state laws. Both model statutes provided for procedures indentical to California Unemployment Insurance Code section 1335. See Hearings on S. 1130 Before the Senate Committee on Fi-

nance, 74th Cong., 1st. Sess. at 602, 623 (1935). It is therefore apparent that the state procedures under examination here were before the Congress and considered by it and by the President's committee. It is ludicrous to believe Congress would acquiesce to the circulation of a model bill if it contained provisions inconsistent with a law (the Social Security Act) which Congress itself was considering at the same time.

Section 1335 is supported not only by the history recited above, but also by common sense and by the commonly accepted meaning of the words "when due". Payments are "due" when they may properly be said to be "owing", *People v. Buckles,* 57 Cal.App.2d 76, 79 (1943), or, in other words, when the obligation has matured or become fixed.[1] *Feeser v. Feeser,* 93 Md. 716, 50 A. 406 (1901); *Cf. Joyce v. Scott,* 265 F.2d 369, 371-372 (1959); See also *In re Ingersoll Co.,* 148 F.2d 282, 284 (1945). While no universal rule may be formulated as to when an obligation is fixed appellants submit that in the context of unemployment insurance the Legislature has spoken, declaring that this point is reached only after an employer's appeal has been heard and resolved. This legislative judgment makes good sense. When an employer appeals, there is a sufficient cloud on the initial

1. In California, following an initial determination favorable to a claimant, the State does commence payment immediately. However, if the employer appeals within the allowable ten day period, such payments are halted; in most cases the claimant has received one or two payments. The fact that the State has commenced payment following the initial determination should not be misconstrued. It is by no means a judgment by the State that the money is "owing" at that point or is legally due. It simply represents a recognition by the State that the employer probably will not appeal and there is little risk in proceeding to pay the claimant immediately. The soundness of this judgment is borne out by the fact that in 1968, for example, employers filed appeals in only two per cent (2%) of those cases where an initial determination was made favorable to the applicant.

determination as to warrant withholding benefits until the appeal is decided.[2] By contrast, at a later point in the proceedings, if the referee affirms the initial determination, the claimant's ultimate success is deemed sufficiently probable as to justify commencement and continuation of payments irrespective of further appeals. Cal. Unemp. Ins. Code § 1335(b).[3]

Obviously, claimants would prefer the extreme sought by the plaintiffs here, i.e., that benefits be due and payable immediately. On the other hand, employers would prefer that benefits be withheld so long as the decision to pay is under appeal at any level, including the appeals through the courts. In balancing these conflicting demands, the Legislature has struck a compromise in suspending benefits following an eligibility determination only through one level of review or until the first appellate level decides in the claimant's favor. See *Abelleira v. District Court of Appeal*, 17 C.2d 280, 298 (1941).

In light of the fact that section 1335 is, in effect, a legislative pronouncement as to when payments are due and because that pronouncement has a sound basis, it is unreasonable to contend that the obligation is "fixed" after the initial determination by a claims interviewer.

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2. California statistics indicate that employers generally do not file frivolous appeals; in 1968, for example, they prevailed in forty-seven percent of cases decided by referees on appeals filed by employers.

3. It is not by any means certain that the Constitution compels payments to be made even at this point. *Cf. Pennsylvania Chamber of Commerce v. Torquato*, 386 Pa. 306, 125 A.2d 755, 767 (1956); *cert. denied*, 352 U.S. 1024; *Chrysler Corp. v. Appeals Board of Michigan Unemployment Comp. Commission*, 301 Mich. 351, 3 N.W.2d 302 (1942); *State ex rel. Campbell v. State*, 223 Ind. 59, 57 N.E.2d 433 (1944); *Dallas Fuel Co. v. Horne*, 230 Iowa 1148, 300 N.W. 303 (1941).

Moreover, this conclusion is buttressed by due process considerations. A sensible interpretation of the subject term is that payments are legally "due" in contested cases only after both sides have had an effective opportunity to be heard. The California statute reflects this principle. At the initial interview generally only the claimant is present; he presents his version of the facts and may bring witnesses and documents to support his claim. The employer, who is preoccupied with business and has had no prior notice of the interview, does not appear. He is contacted by telephone and informally asked for his account of the facts. Following the determination, the employer is informed of the decision and may then appeal. Until this point only the claimant has had a full opportunity to present his case; *as a practical matter,* the employer has not had an effective opportunity to be heard. Until this opportunity is available, it is grossly unfair to rule that payments are due. To compel payments during the pendency of the employer's appeal would be to substantially dilute the employer's right to be heard. *Cf. Babb v. Bullitt,* 310 Ky. 211, 220 S.W.2d 394 (1949). Such payments are unrecoverable[4]

4. While there are statutory recoupment procedures available, Cal. Unemp. Ins. Code § 1379, these may be used only when the claimant has committed some fraud or misrepresentation or when it would not be against equity and good conscience to seek recoupment. Cal. Unemp. Ins. Code § 1375. See also § 1380. Moreover, even if it is not against equity and good conscience to request repayment, some claimants are simply insolvent and unable to repay. In any event, should plaintiffs prevail here, the state may be compelled to abandon the lenient policy exemplified by section 1375. *Cf.* Graham, *Public Assistance: The Right to Receive; The Obligation to Repay,* 43 N.Y.U. L.Rev. 451, 487 (1968).

The unrecoverable money which would be paid out during the pendency of appeals would have a cumulative, measurable effect on the reserve fund and would, after a period of time, cause employers to be charged a higher rate. See Cal. Unemp. Ins. Code §§ 930, 976.5, 977 and 978.

and, in effect, amount to an adjudication, before the employer has had a meaningful chance to contest it, that he is liable for benefits on behalf of the claimant.

It may be asked why employers have not complained about this seeming lack of due process. The answer is that the claims determination procedure is geared primarily to handle thousands of claims expeditiously. In the overwhelming percentage of cases attendance by an employer at a determinations interview would inconvenience the employer for no valid reason—he is not likely to contest the determination anyway. As a matter of fact, it he does wish to appear, he may do so but this happens only infrequently since, generally, the employer first learns of the interview when the claims interviewer calls him while the claimant is in the process of being interviewed at the Department's office. Thus, practical considerations dictate that the employer forego his technical right to appear at the initial interview. And 98% of the time the employer is not prejudiced. In those few cases where the employer sees fit to appeal, he should have a real opportunity to be heard before a ruling adverse to him is given effect.

The Legislature has decreed that payments are due not after the initial determination of eligibility, but only after the employer has had an opportunity to have his appeal heard. This procedure is both practical and fair, a conclusion partially confirmed by the fact that the Secretary of Labor has certified the California procedure (and similar statutes throughout the nation), thus indicating his satisfaction that there is no inconsistency between section 1335 of the California Unemployment Insurance Code and section 503(a)(1) of the Social Security Act. The opinion of the Secretary in this regard is entitled to great weight. *Cf. Rosado v. Wyman,* 397 U.S. 397, 406-407, 415 (1970).

Parenthetically, we would note that the district court's decision could have ironic and unfortunate consequences: (1) By stressing that the state has commenced payment and that the initial determination is critical, the court is inviting a change in the law which would be designed partially to compensate for the expense occasioned by the *Java* decision. Such a change would be disastrous for the overwhelming majority of claimants. It would prohibit payment altogether until the appeal period has run or the referee has made a decision. (2) A hearing at the initial stage would itself consume a considerable period of time. Whereas now 98% of all claimants receive payments almost immediately, a large percentage of them would be delayed by the requirement of a hearing, thus frustrating the intent of the unemployment insurance program on a scale of unprecedented magnitude.

II. The Principles of Goldberg v. Kelly, 397 U.S. 254 (1970), Apply to Welfare Cases But Not to Unemployment Insurance.

A. THE FACTS OF GOLDBERG ARE DISTINGUISHABLE FROM THOSE INVOLVED HERE.

In the *Goldberg* case, a welfare claimant sought redress against action by the state in terminating welfare benefits which were paid out of general tax revenues. Unemployment insurance programs, however, operate differently from welfare programs. First, an application for unemployment insurance benefits involves not only the claimant and the state but the private employers who fund the program. The money to pay benefits does not come from general tax revenues but from an identifiable segment of the population (employers) which is required to make contributions into a reserve fund to pay benefits. Because of this method of funding the program, the state does not have the same direct interest it has in the welfare situation where

every dollar the state saves may be available for other programs which compete for state funds. In the unemployment insurance area the state is basically neutral since it cannot use the unemployment insurance fund for other state purposes but must simply insure that sufficient money is available in the fund to pay eligible claimants. The state, then, may be looked upon as a fiduciary in administering the unemployment insurance fund. The real parties in interest are the employers who will be required to pay more into the fund if plaintiff's position here is adopted. The injection of this private interest introduces an element in this case which was not present in *Goldberg*. The importance of this element is that here we are concerned with due process for two parties—claimants and employers—whereas in the welfare situation the concern was solely that the claimant would receive due process.[5]

Second, the posture of the welfare claimant in *Goldberg* is different from the instant unemployment insurance claimant. In *Goldberg* the welfare claimant was initially found eligible for benefits and was paid on a continuing basis. Following a caseworker's recommendation the claimant was notified that the department proposed to terminate benefits and the claimant was given an opportunity to submit in writing his reasons why such termination should not take effect. The U. S. Supreme Court ruled that this decision to terminate could not constitutionally be made without a prior hearing. The case here is quite different. Here no decision

5. The first sentence of the majority opinion in *Goldberg* demonstrates this concern:

> "The question for decision is whether a State which terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination *denies the recipient procedural due process* in violation of the Due Process Clause of the Fourteenth Amendment." 397 U.S. 255. (Emphasis added.)

to terminate is imminent. Payments are not being terminated but merely held up prior to a final trial-type adjudication on the initial question of eligibility.

B. THE PROCEDURES UNDER THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE AFFORD PROTECTION THAT WAS UNAVAILABLE IN GOLDBERG.

Due process is not a brittle concept incapable of bending to accommodate differing factual circumstances. What due process requires in one case may be wholly unsuitable to another. The concept takes on meaning only when it is considered in the context of a particular statutory framework. It is not one of fixed content unrelated to time, place and circumstances. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

Due process is a rule which seeks to achieve a balance between legitimate state interests[6] and rights of individual citizens. In the *Goldberg* case the court found that the state interest did not justify the procedures employed or, in other words, that the balance was lopsided in favor of the state welfare department. Prior to being terminated, the claimant in *Goldberg* had no opportunity for a personal appearance, oral presentation or confrontation and cross-examination of adverse witnesses. 397 U.S. at 259.

Unlike *Goldberg*, here there is no semi-unilateral administrative reversal of an eligibility determination which may be followed by a post-termination hearing. In *Goldberg* the state sought to take quasi-judicial action adverse to the claimant without affording him a hearing. Here the claimant has had a hearing and has been determined eligible but the employer has not had his hearing and it is to give the employer *his* chance to be heard that a temporary stay

6. "State interest" may be a misnomer in this case. While the state does have an interest in the sense that this program is socially desirable, the critical financial interest is that of private employers.

of benefits is imposed. Until that opportunity has been afforded, the question of eligibility is still unresolved.

Indeed if there is any imbalance in the procedures involved in this case it is in favor of the claimant who, when he makes his initial application and has an interview, is permitted to submit both written and oral evidence, to present witnesses, and to dispute on the spot any information supplied by an employer who communicates generally only by telephone or in writing.

In part to redress this imbalance, the employer is given an opportunity to appeal the initial determination and have a hearing. As pointed out earlier, for all practical purposes this is his first opportunity to present his case effectively. He may arm himself at this time with the books of the company, with witnesses and with the persuasive weight of his own testimony. In any event he should not be penalized by his insistence on an opportunity fully to present his case. Commencing payments until a referee has rendered a decision would amount to such a penalty and would vitiate the effect of giving the employer the right to be heard.

C. NEED IS THE PIVOTAL CONSIDERATION FOR WELFARE ELIGIBILITY BUT NOT FOR UNEMPLOYMENT INSURANCE.

Critical to an understanding of the *Goldberg* decision is the recognition that the extent of a claimant's need was determinative on the question of whether that claimant was being afforded procedural due process. This is set out in the opinion in unequivocal terms, "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . ." 397 U.S. at 263. The claimant's "brutal need", noted by the lower court, was the fulcrum on which the Supreme Court based its holding.

But need is not relevant to a determination of eligibility for unemployment insurance benefits.[7] Indeed the irony is that the greater an employee's need the less unemployment insurance he is likely to receive. The amount of weekly benefits a worker receives varies proportionately with his wages in a four-quarter period and the quarter in which he receives his highest wages. Cal. Unemp. Ins. Code §§ 1275, 1280 and 1281. The higher his wages the higher the weekly benefit and the total maximum benefits he receives. Thus those who have more need receive lower, not higher benefits. Moreover, a worker who has earned less than $720 in the four quarters of his base period is not entitled to any benefits whatsoever. Cal. Unemp. Ins. Code §§ 1275 and 1281. Consequently the worker who may be most in need of unemployment insurance has no entitlement to benefits.

Thus the "crucial factor" of need which was dispositive in *Goldberg* cannot have the same impact in deciding the question of due process in unemployment insurance cases. While we cannot ignore the fact that some unemployment insurance claimants are in fact needy, we must recognize that unemployment insurance is available to rich and poor alike and hence it is illogical to permit the right to benefits to be accelerated in direct relation to the severity of a claimant's economic situation.[8]

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7. "Unemployment compensation is greatly preferable to relief because it is given without any means test." H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935). "Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis but only while the worker is involuntarily unemployed." S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935).

8. Clearly, the "brutal need" mentioned in *Goldberg* does not predominate in unemployment insurance. In 1968, for example, 43% of eligible claimants received the maximum weekly benefit amount. The average earnings of such claimants was $8,329 annually.

The difference between welfare and unemployment insurance with respect to need was pointed out by a noted authority who stated, ". . . *public assistance* programs provide benefits according to individual and demonstrated budgetary needs and are usually financed from so-called general revenues, i.e., tax impositions of the direct or excise type without particular connection between the class of taxpayers or transactions bearing the burden and the class of recipients benefited by the program. *Social insurance,* on the other hand, is characterized by benefits which are payable without proof of need and is usually financed, at least in part, by either the prospective beneficiaries themselves or a class of taxpayers upon whom these beneficiaries are economically dependent or both . . ." Riesenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies Of Protection Against Wage Loss,* 8 Vand. L. Rev. 218, 223 (1955). The distinction is of considerable importance since a delay of payments in a program predicated primarily on need may be intolerable while less protracted delays under other programs where need is not strictly relevant may be within constitutional limits.

III. The Decision In This Case Will Have Nationwide Significance.

Currently forty-eight jurisdictions other than California utilize a procedure virtually identical to California Unemployment Insurance Code section 1335. Should plaintiffs prevail here the annual unrecoverable loss to employers of the State of California could be as high as $800,000. Nationwide the loss would obviously be in the millions of dollars. Moreover, the certification of the Secretary of Labor of forty-nine state programs would be immediately imperiled.

More significantly, the *Java* case has spawned a rash of other lawsuits challenging a stay of benefits under facts

similar but not identical to those in this case. For example, in *McCrae v. California Department of Human Resources Development,* N.D. Cal., No. C-70 1146 ACW, a claimant was initially found ineligible but this determination was reversed by a referee who found the claimant eligible. The Department did not pay benefits pending the employer's appeal to the Unemployment Insurance Appeals Board. Brandishing the *Java* decision of the District Court, plaintiffs in *McCrae* have attacked the state's suspension of benefits. Cases presenting other issues based on *Java* include *Hicks v. California Department of Human Resources Development,* Contra Costa County Superior Court No. R-18243 (Cal.); *Crow v. Shultz,* N.D. Cal., No. C-70 1128 ACW; *Coronado v. California Department of Human Resources Development,* Los Angeles County Superior Court No. 974004; *Torres v. New York State Department of Labor,* 70 Civ. 2408, S.D.N.Y.; *Ahnne v. Department of Labor Industrial Relations of Hawaii,* Cir. Ct. No. 31058.[9]

Other states have indicated their concern by stating their desire to join as amici curiae at some point in these proceedings. To date these states include: Colorado, Delaware, Hawaii, Idaho, Illinois, Kentucky, Maine, Maryland, New Hampshire, Oregon, Ohio, Tennessee, Texas, and Utah. Prominent employer organizations in both California and New York have indicated a similar intent.

Considering the fact that in California alone there were some 960,000 claims for unemployment insurance, it is no exaggeration to state that the *Java* decision and its progeny will severely clog and impede state administration of un-

9. In an unrelated field, the case has also been cited by a workmen's compensation claimant who argues his temporary disability payments should not be terminated without a prior hearing. See *Galli v. Familian Pipe and Supply Co. of Los Angeles, et al.,* Alameda County, Cal., 69 OAK 30280.

employment insurance programs and will unfairly tax the employers who will be required to pay at a considerably higher rate than has heretofore been necessary.

An application of the *Goldberg* decision to all unemployment insurance claimants would results in an annual unrecoverable loss to the employers of California of between $17.8 million and $166.4 million. See Affidavit of Nicolo Pino, dated July 20, 1970, attached hereto as Appendix C.

IV. A Court Should Save the Constitutionality of a Statute Whenever Possible.

A cardinal principle of statutory construction is that a statute should be saved whenever possible and not destroyed. *Labor Board v. Jones and Laughlin,* 301 U.S. 1, 30 (1937); *U.S. v. Menasche,* 348 U.S. 528, 538 (1955); *Epstein v. Helvering,* 120 F.2d 427 (1941). As the United States Supreme Court has stated, "It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose." *Communications Association v. Douds,* 339 U.S. 382, 407 (1950); See also *Antilles Surveys, Inc. v. De Jongh,* 358 F.2d 787; *cert. denied,* 385 U.S. 900 (1966); See generally 16 C.J.S., Constitutional Law, §§ 92-101.

In the instant case, plaintiff's real objection is that the withholding of payments pending an employer appeal results in an inordinate delay and that the claimant, even if eventually victorious, nevertheless must wait for payment for an unreasonable length of time. What is reasonable or unreasonable, of course, depends on the circumstances of each case. In the *Goldberg* case, for example, the delay occasioned by the withholding of payments was some four months and the court concluded that a delay of this length was unreasonable. In the instant case, however, the delay is

on the average approximately seven or eight weeks, a del
which is not unreasonable in light of the problems of
ministering a program of this magnitude. In any event
court below could easily have framed an order to the eff
that the statute, while not unconstitutional on its fa
nevertheless had been unconstitutionally applied in that
delay occasioned by section 1335 was unreasonable to
point of denying due process to a claimant. The court co
well have issued a guideline for the department indicati
that a lesser delay would promote the purpose of
statute while at the same time permit the claimant to ha
a speedy decision and not be seriously inconvenienced. T
court's duty in this respect is underscored by the fact th
most other states have a statute similar to section 1335 a
the ruling in the instant case will indubitably encoura
similar attacks on statutes across the nation. Under su
circumstances, it is urged that a court should be particular
reluctant to rule that a state statute is unconstitutional.

CONCLUSION

For the reasons stated this Court should note probabl
jurisdiction.

DATED: August 6, 1970

Respectfully submitted,

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Appendix A

In the United States District Court for the Northern District of California

Filed—May 14 1970
Clerk, U.S. Dist. Court, San Francisco

Case No. C-69 350 ACW

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,

Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield as Director of the California Department of Human Resources Development; Esther Perry, as Manager the Pittsburg, California branch of the California Department of Human Resources Development; Ramon L. Jimenez as Manager of the Richmond, California branch of the California Department of Human Resources Development,

Defendants.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Before: Jertberg, U.S. Circuit Judge; and Zirpoli and Wollenberg, District Judges.

This is a challenge, on both statutory and constitutional grounds, to certain aspects of the California unemployment compensation program. This program, certified by the Sec-

retary of Labor under the provisions of the Social Security Act (42 U.S.C. § 503), provides for the payment of insurance benefits, over an extended period of time, to persons who find themselves unemployed "through no fault of their own". Calif. Unempl. Ins. Cde. § 100. These payments begin after an initial determination of eligibility by an eligibility interviewer who is directed to consider all information submitted by the claimant, his former employer, and others. Calif. Unempl. Ins. Cde §§ 1326 et seq. If this initial determination is favorable to the claimant, payments begin immediately. The employer, however, is then given ten days in which to appeal; if an appeal is filed, benefits are stopped pending decision on the appeal without any provision for a pre-termination hearing. Calif. Unempl. Ins. Cde. § 1335. It is this statutorily directed stoppage of benefits without prior notice and hearing which is under challenge by plaintiffs.

Plaintiffs' argument is three-fold. First, it is said that since the median delay in resuming payments after an employer has invoked § 1335 is about seven weeks, the California program conflicts with certain clearly defined national and state goals. The California scheme is intended to stave off extreme personal hardship as well as society-wide depression in times of increasing unemployment. See Calif. Unempl. Ins. Cde. §§ 100-101. This end is clearly thwarted when a claimant must wait some fifty days for payments to resume. Second, the California statute is said to violate the federal law which directs that state unemployment compensation programs must be "reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1). Third, it is argued that the denial of benefits, without a prior hearing, to persons who have already been found initially eligible for such benefits violates plaintiffs' rights to due process

of law under the federal constitution. Most relevant to this is the Supreme Court's recent decision in *Goldberg v. Kelly*, ... U.S. ..... (1970).

The constitutional aspects to this challenge to § 1335 warranted the appointment of a three-judge court. 28 U.S.C. § 2284.

Plaintiffs' three arguments are, in fact, nearly co-extensive. The "payment when due" directive of the Social Security Act is indicative of a congressional desire to help the jobless when they need it most. It can also be read as a reiteration of the classic due process standard, i.e. when a person has been found entitled to a government benefit, this benefit in most cases cannot be taken away without certain pre-termination procedures being followed.[1] It seems best, therefore, to analyze the operation of the California system in order to determine when an individual claimant is "entitled" to unemployment compensation. If payments are "due", deprivation of those payments without a prior hearing would raise questions under both the federal statute and the Constitution. Most simply, when is "when due"?

The parties herein have entered into a stipulation which does much to clarify the actual practices of the State Department of Human Resources Development. A claimant for unemployment insurance benefits must initially file Forms DE 1101, 1426 and 3893. These forms, taken together, apprise the eligibility interviewer of the basis

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1. An entitlement to unemployment insurance benefits or welfare payments is no different from the due process standpoint than an entitlement to a pension, or a farm subsidy, or a professional license to practice. Once a person's qualification for the benefit is shown, it cannot be arbitrarily denied, or withdrawn, without due process standards being fulfilled. See *Goldberg v. Kelly, cit. supra*, note 8; and Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 Harv. L.R. 1439 (1968).

of the claim, the name of the claimant's previous employer, the reason for his no longer working, his work experience, and so on. The question most frequently basic to disputed cases, i.e. the claimant's reasons for no longer working, is answered on DE 1101 and copies of this form are immediately sent to the previous employer for verification. The employer is then bound to submit, within ten days, "any facts then known which may affect the claimant's eligibility for benefits". Calif. Unempl. Ins. Cde. § 1327. If the employer raises an issue as to eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job.

All of this tends to show that the eligibility interviewer has at his disposal information from both employer and claimant prior to the "Eligibility Benefit Rights Interview", at which he speaks personally with the claimant. The interviewer has, according to the Local Office Manual used in California, the duty "to seek from any source the facts required to make a prompt and proper determination of eligibility". The actual decision may be suspended an additional ten days to get further information. If employer statements leave certain questions unresolved, the employer "must be given an opportunity to provide additional information". L.O.M. §§ 1400.3; 1400.5. At the interview itself, the interviewer is told to make "telephone contact with other parties . . . ." if at all possible. L.O.M. 1404.4. Interested persons must be allowed to "confirm, contradict, refute, or explain any evidence [which is relevant]". L.O.M. § 1404.4.

The eligibility interviewer must, then, consider the evidence presented by all sides and make a "determination" or "determination ruling" as to eligibility. There seems little question that this is the critical point in the California

procedure. The Department itself proclaims that "[t]he determination is the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that [b]enefits are paid promptly if claimant is eligible". L.O.M. § 1400.1. Payments begin upon this decision, and for 95% of claimants, no further problem arises as to initial eligibility.

Defendants, however, argue that payments are not in fact "due" until another ten days passes without the employer appealing. This flies in the face of actual Department practice, which is to begin payments immediately upon the initial determination of eligibility and to stop them later upon an employer appeal.[2] The appeal Form DE 1000, upon being filed, halts payments. No hearing is held; no chance is given the claimant to rebut, even in writing, new information offered by the appellant. It is clear that in California payments become "due", and are paid, upon the favorable decision of the eligibility interviewer. It is only subsequently, generally after two payments have been made, that an employer appeal will result in automatic stoppage.

"When due" is, then, upon the initial determination of eligibility. At that point, all parties have been heard, evidence has been collected, and an adjudication made. This being the case, California's provision allowing benefits to be stopped without any pre-termination procedures raises serious due process questions. And the continued arrest of payments for a median period of seven weeks similarly causes doubt as to whether California's program

2. "At least since 1948 . . . the Department of Human Resources Development . . . has paid out unemployment compensation benefits to claimants immediately after such claimants have been determined eligible by a determinations interviewer". Parties' Stipulation, filed April 14, 1970.

is "reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1).

This Court finds the present case indistinguishable from *Goldberg v. Kelly, cit. supra.* See also *Wheeler v. Montgomery,* .... U.S. .... (1970). *Goldberg* challenged the right of a State to terminate welfare benefits without a prior evidentiary hearing at which the recipient is given the chance to confront adverse witnesses and present his own evidence, verbal or written. As here, the defendants in *Goldberg* argued the State's interest in protecting public funds. The Supreme Court, balancing this interest against the interest of the welfare recipient in having the necessities of life while the bureaucracy mulls over his continued eligibility, found the fiscal argument somewhat weak, and rejected it. Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster stricken that there is someone, somewhere, worse off than he, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in *Kelly v. Wyman,* 294 F. Supp. 893 (1968), and the garnishee in *Snaidach* [sic] *v. Family Finance Corp. of Bay View, et al.,* 395 U.S. 337 (1969).

Further, the defendants' efforts to distinguish this case from the constitutional reasoning of *Kelly* and *Snaidach* only serve to point up the validity of the statutory grounds argued by plaintiffs. The most fundamental purpose of both the federal and the state unemployment compensation laws is "to *prevent* the burden of injured employees becoming charges upon society". *Abelleira, et al. v. The District Court of Appeal, etc.,* 17 C.2d 280, 300 (1941);

Calif. Unempl. Ins. Cde. §§ 100-01.[3] Defendants urge that public assistance is available to plaintiffs, but Congress, in enacting the Social Security Act, has found that the dole is often inadequate and always humiliating. This was certainly the primary reason for 42 U.S.C. § 503 (a)(1) and the requirement that State programs assure full payment of benefits "when due". Yet some five thousand *eligible* recipients each year in California find their payments halted for a median period of seven weeks. Since the average period of unemployment in California is, according to uncontested argument before this Court, some nine weeks, it is clear that as to these people, payments are not made "when due", and the fundamental intent and policy of the Social Security Act are thwarted.

Accordingly, this Court finds Calif. Unempl. Ins. Cde. § 1335 defective on both constitutional and statutory grounds. By not providing for a pre-termination hearing, it runs counter to the principles enunciated in *Goldberg v. Kelly, cit. supra.* And by being applied so as to result in a median seven week delay in payments to claimants who have been found eligible for such payments, the California statute violates the directive of 42 U.S.C. 503(a)(1).

Therefore, *IT IS HEREBY ORDERED* that defendants, their successors in office, agents, and employees, be, and

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3. The total inadequacy of locally administered charity in times of nation-wide cyclical unemployment led sponsors of unemployment insurance legislation to urge upon Congress a purely federal scheme. Political and legal considerations resulted, however, in the present federal-state setup, with the federal government imposing many standards to be followed by the States. Among these standards was the requirement of payment of claims "when due". On the legislative history, see generally Witte, *Development of Unemployment Compensation,* 55 Yale L.J. 21 (1945). See also Note, *Charity vs. Social Insurance in Unemployment Compensation Laws,* 73 Yale L.J. 334 (1963); *Rivard v. Bijou Furniture Co.,* 27 A. 2d 853 (1942); *Steward Machine Co. v. Davis,* 301 U.S. 548, 586-87 (1937).

are, enjoined, during the pendency of this action, from enforcing that part of Calif. Unempl. Ins. Cde. § 1335 which provides that "[i]f an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision". Defendants, their successors in office, agents, and employees, shall not suspend unemployment benefits due plaintiffs and members of their class on the ground that an eligibility determination has been appealed except after a prior hearing in accordance with the principles enunciated in *Goldberg v. Kelly, cit. supra.*

Execution of this Order will be stayed ten (10) days from the date of its filing. Any further stay will be granted only upon a proper motion and showing by defendants.

Dated: April 11, 1970

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

/s/ ALBERT C. WOLLENBERG
United States District Judge

Appendix B

§ 503. State laws, provisions required; stopping payments on failure to comply with law

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary of Labor may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 1606(b) of Title 26), immediately upon such receipt, to the Secretary of the Treasury to the credit of the unemployment trust fund established by section 1104 of this title; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of

administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b) of Title 26:

Provided, That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration: *Provided further,* That the amounts specified by section 1103(c) (2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices; and

(6) The making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law; and

(8) Effective July 1, 1941, the expenditure of all moneys received pursuant to section 502 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law; and

(9) Effective July 1, 1941, the replacement, within a reasonable time, of any moneys received pursuant to section 502 of this title, which, because of any action

or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary of Labor for the proper administration of such State law.

(b) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State: *Provided,* That there shall be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisdiction under such State law: *Provided further,* That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

(c) The Secretary of Labor shall make no certification for payment to any State if he finds, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law—

(1) That such State does not make its records available to the Railroad Retirement Board, and furnish to the Railroad Retirement Board at the expense of the

Railroad Retirement Board such copies thereof as the Railroad Retirement Board deems necessary for its purposes; or

(2) That such State is failing to afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law.

Aug. 14, 1935, c. 531, Title III, § 303, 49 Stat. 626; June 25, 1938, c. 680, § 13(g), 52 Stat. 1112; June 20, 1939, c. 227, §18, 53 Stat. 848; Aug. 10, 1939, c. 666, Title III, § 302, 53 Stat. 1378; 1946 Reorg.Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 10, 1946, c. 951, Title IV, § 416(c), 60 Stat. 991; 1949 Reorg.Plan No. 2, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; Aug. 28, 1950, c. 809, Title IV, § 405(b), 64 Stat. 560; Aug. 5, 1954, c. 657, § 5(a)(1), 68 Stat. 673.

Appendix C

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United States District Court for the Northern District of California

No. C-69 350ACW

Judith Java, et al.,
Plaintiffs,

vs.

California Department of Human Resources Development, et al.,
Defendants.

AFFIDAVIT

I, Nicolo Pino, the undersigned, having been duly sworn, do depose and state that:

1. I am the Acting Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California; and I have, in my possession and under my control, the statistical records of the said Department of Human Resources Development relating to unemployment insurance determinations made, appeals filed with referees of the California Unemployment Insurance Appeals Board and the outcome of said appeals, the amount of unemployment insurance benefits paid by

said department from the Unemployment Fund, and the amount of said unemployment insurance benefits paid to claimants ineligible for said benefits and not recovered.

2. The statistical records of the Department of Human Resources Development indicate the following determinations made, referee appeals, benefit activity, and benefits paid to claimants ineligible for said benefits and not recovered:

A. During the year 1969, 404,930 determinations were made by the department disqualifying claimants from receiving unemployment insurance benefits.

(1) Approximately 28 percent of the determinations, or 113,395, were made disqualifying claimants because they had insufficient wages in their base period to file a valid claim.

(2) Approximately 34 percent of the determinations, or 139,274, were made disqualifying claimants who had sufficient wages in their base period to file a valid claim but who had left their last employment under disqualifying conditions.

(3) Approximately 38 percent of the determinations, or 152,261, were made disqualifying claimants in "claim status", that is, in the process of filing a weekly claim for unemployment insurance benefits as opposed to a new or additional claim.

B. During the year 1969, 395,740 determinations were made by the department holding claimants with valid claims eligible for unemployment insurance benefits. Approximately two percent, or 8,315, of these determinations were appealed to a referee by the claimant's last employer. Of the appeals to referees by employers, approximately 2,990 were decided in favor of such employer.

C. During the year 1969, the average weekly unemployment insurance benefit paid was $52.

D. During the year 1969, the median time elapsed between filing an appeal to the California Unemployment Insurance Appeals Board and receiving a decision by a referee of said Board was 42.1 days, or 6.0 weeks.

E. During the years 1965 through the year 1969, an average of thirty-six percent of the unemployment insurance benefits paid to claimants not eligible for said benefits were not recovered.

F. Using the above figures contained in paragraphs A through E, it is my estimation that if disqualified claimants should be paid benefits until given a referee hearing and if claimants held eligible should be given a hearing on the appeal by their last employer before benefits may be suspended, the approximate minimum effect on the Unemployment Fund will be a loss of either $49,383,360 or $17,778,010 in unemployment insurance benefits paid to claimants and not recoverable. This minimum effect is based upon the following mathematical formula:

(1) Pursuant to Unemployment Insurance Code Section 1328, all parties have ten days or 2.0 weeks to appeal an adverse determination and therefore benefits will have to be paid to disqualified claimants for at least two weeks resulting in 404,930 claimants receiving an average of $52 for two weeks equaling $42,113,000 in benefits paid out;

(2) Out of the 404,930 disqualified claimants in the year 1969, 30,004 appealed the department's determination and therefore would have to be paid benefits for a period of six weeks at a rate of $52 a week, before a referee of the California Unemployment Insurance Appeals Board issues a decision, or an amount of $9,361,248;

(3) The 8,315 claimants held eligible by the department subject to the employer's appeal to a referee would receive $52 benefits for six weeks, or an amount of $2,594,280;

(4) However, out of the 30,004 claimants who appealed in 1969, 7,268 were successful on appeal and therefore were entitled to all benefits received for both the two-week period prior to the filing of an appeal and the six-week period prior to the referee decision resulting in an amount of $3,023,488 correctly paid which is subtracted from the amount of all benefits paid;

(5) Out of the 8,315 claimants found eligible by the department subject to an employer appeal to a referee, 5,325 are dismissed or decided in the claimant's favor and therefore those claimants were entitled to all benefits received for the six-week period prior to the referee's decision resulting in an additional amount of $1,661,400 correctly paid;

(6) Adding the amount paid out in benefits prior to the filing of an appeal by the claimant (subparagraph 1), the amount paid out to disqualified claimants prior to the referee decision on their appeal (subparagraph 2), and the amount paid out to eligible claimants prior to the referee decision on their employer's appeal (subparagraph 3), and substracting the amounts paid to claimants who prevailed in their or the employer's appeal (subparagraphs 4 and 5), the result is $49,383,360 in benefits paid to claimants found ineligible for such benefits;

(7) If it is determined under Section 1375 of the Unemployment Insurance Code that it is against equity and good conscience to recover amounts paid to claimants in these circumstances, the minimum effect on the Unemployment Fund should such claimants be entitled to a referee hearing prior to the denial of benefits would be $49,383,360;

(8) If it is determined under Section 1375 of the Unemployment Insurance Code that it is not against equity and good conscience to recover amounts paid to claimants in

these circumstances, the minimum effect on the Unemployment Fund should such claimants be entitled to a referee hearing prior to the denial of benefits would be thirty-six percent of $49,383,360 or $17,778,010 of said benefits which are not recoverable.

G. Using the above figures contained in paragraphs A through F, it is my estimation that if such claimants should be entitled to a referee hearing prior to the denial of benefits, the approximate maximum effect on the Unemployment Fund would be a loss of either $166,360,272 or $59,889,698 in benefits paid out to claimants and not recoverable. This maximum effect is based upon the following mathematical formula:

(1) Assuming that all 404,930 disqualified claimants appeal the department's adverse determinations, benefits would have to be paid out to such 404,930 claimants for the full eight-week period, that is, the two-week period allowable for filing an appeal plus the six-week period that elapses between the filing of appeal and the referee's decision, multiplied by $52, the average benefit amount paid, to give an amount of $168,450,880 benefits paid;

(2) Added to this amount is the amount of $2,594,280 which represents benefits paid to claimants held eligible by the department subject to the employer's appeal (see subparagraph F (3), above) to equal $171,045,160 in benefits paid;

(3) However, subtracted from this amount of benefits paid, will be the amount of $4,684,888 paid to the claimants held eligible for such benefits (see subparagraphs F (4) and F (5) above) leaving an amount of $166,360,272 paid out to ineligible claimants;

(4) If it is determined under Section 1375 of the Unemployment Insurance Code that it is against equity and good conscience to recover amounts paid to ineligible claim-

ants in these circumstances, the maximum effect on the Unemployment Fund should such claimants be entitled to a referee hearing prior to the denial of benefits would be $166,360,272;

(5) If it is determined under Section 1375 of the Unemployment Insurance Code that it is not against equity and good conscience to recover amounts paid to ineligible claimants in these circumstances, the maximum effect on the Unemployment Fund should such claimants be entitled to a referee hearing prior to the denial of benefits would be thirty-six percent of $166,360,272 or $59,889,698 of said benefits which are not recoverable.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ NICOLO PINO
NICOLO PINO

State of California
County of Sacramento—ss.

Nicolo Pino being first duly sworn under oath, represents that he has subscribed to the foregoing Affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 22nd day of July, 1970.

/s/ SYDNEY R. JOHNSON
Notary Public in and for the
State of California